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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 309

WERNER VON CLEMM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 877–884) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered July 30, 1943 (R. 885). The petition for a writ of certiorari was filed August 31, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended

by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether Executive Orders 8389 and 8405, which prohibit, except under appropriate licenses, transactions in foreign exchange involving property belonging to certain European nations or their nationals, are invalid on the ground that Section 5 (b) of the Trading with the Enemy Act of 1917, as amended, authorizing the President to promulgate such orders, is an unconstitutional delegation of legislative power.

STATUTE AND ORDERS INVOLVED

Section 5 (b) of the Trading with the Enemy Act of 1917, as amended, and Executive Order 8389 (April 10, 1940, 5 F. R. 1400), as amended by Executive Order 8405 (May 10, 1940, 5 F. R. 1677), are set forth in the Appendix, *infra*, pp. 9–15. Section 1 of the Act of March 9, 1933 (48 Stat. 1, 12 U. S. C. 95b), and the Joint Resolution of May 7, 1940 (54 Stat. 179), approving Executive Orders, are set forth ~~in the Appendix~~, *infra*, pp. ~~9–15~~ 6–7.

STATEMENT

Petitioner, the Pioneer Import Corporation, and several others as to whom a severance was

had[1] (R. 37–38), were indicted on April 24, 1942, in the District Court for the Southern District of New York in one count charging a conspiracy in violation of Section 37 of the Criminal Code (18 U. S. C. 88). The indictment (R. 5–10) charged that petitioner conspired to import diamonds, in which nationals of the Netherlands, Belgium, and Luxembourg had interests, on or after May 10, 1940, for the purpose of selling them in this country, representing at all times that the diamonds were of German origin and were cut in Germany. In pursuance of this plan it was alleged he conspired to violate (1) 12 U. S. C. 95a and Executive Order 8405 issued pursuant thereto, by paying a New York bank for the diamonds without first obtaining the requisite authority from the Secretary of the Treasury; (2) 18 U. S. C. 80, by falsely representing to the Treasury and Commerce Departments that the diamonds were of German origin and cut; (3) 19 U. S. C. 1591, by the same false representations in his customs declaration and in introducing the diamonds into commerce within the United States. Six overt

[1] Carlos Hoepfner, Carl Von Clemm, Ernest Cremer, Jan Verboven, Edward Vanderlinden, Bozenhart, and Frensel, "the first names of said Bozenhart and Frensel being to the Grand Jurors unknown, and divers other persons to the Grand Jurors unknown, among them being persons constituting the High Command of the German Army, persons constituting the Diamond Control Office of the German Army in Antwerp, Belgium, and agents and employees thereof; and partners and members of International Mortgage Handelgesellschaft * * *."

acts in pursuance of the conspiracy were also alleged.

A jury trial was had, and both petitioner and the Pioneer Import Corporation were found guilty (R. 735). Petitioner was sentenced to imprisonment for two years and to pay a fine of $10,000 (R. 853), and Pioneer Import Corporation was fined $10,000 (R. 854). Upon appeal to the court below, both convictions were affirmed (R. 877–884).

ARGUMENT

Since petitioner does not appear to contest the sufficiency of the evidence (Pet. 3),[2] the sole remaining issue is whether the statute and executive orders involve an unconstitutional delegation of legislative power.

1. In Section 5 (b) of the Trading with the Enemy Act of 1917, as amended (*infra*, pp. 9–10),[3]

[2] The evidence in support of the conviction is summarized in the opinion below (R. 878–881).

[3] In the quarter century that this provision has been in the statute books there appears to have been but one reported attack on it charging that it constituted an improper delegation of lawmaking power, and in that case it was rejected as being without merit. *Campbell* v. *Chase National Bank*, 5 F. Supp. 156 (S. D. N. Y.), affirmed, 71 F. (2d) 669 (C. C. A. 2), certiorari denied, 293 U. S. 592. In decisions by this Court and the lower federal courts, the constitutionality of Section 5 (b) has been assumed. See *Perry* v. *United States*, 294 U. S. 330, 356; *Ubersee Finanz-Korporation Aktien Gesellschaft* v. *Rosen*, 83 F. (2d) 225, 228 (C. C. A. 2), certiorari denied, 298 U. S. 679; *British-Ameri-*

Congress authorized the President, during time of war or any other period of national emergency declared by him, to "investigate, regulate, or prohibit," *inter alia,* any transactions in foreign exchange and transfer of credit between banks or payments by or to banks. Upon the invasion of Denmark and Norway, the President, acting pursuant to this statutory power and "by virtue of all other authority vested in me," took steps to freeze the property in the United States of the invaded countries and their peoples by Executive Order 8389 of April 10, 1940 (5 F. R. 1400). The subsequent German invasion of the Netherlands, Belgium, and Luxembourg brought forth on May 10, 1940, an extension of the protection afforded by the freeze order to protect the property interests of these nations and their nationals (Executive Order 8405, 5 F. R. 1677).

Since it is plain that the freeze order involved an exercise of the war power and the power over international affairs, its validity may be sustained without reference to the ordinary principles of delegation on which petitioner relies (Pet. 8–9); for in such circumstances this Court has recog-

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can Tobacco Co. v. *Federal Reserve Bank*, 104 F. (2d) 652, modified, 105 F. (2d) 935 (C. C. A. 2), certiorari denied, 308 U. S. 600; *Smith* v. *Witherow*, 102 F. (2d) 638, 641 (C. C. A. 3). State courts have assumed the validity of the freeze order and applied it. *Commission for Polish Relief* v. *Banca Nationala A Rumaniei*, 228 N. Y. 332; *Carbone Corporation* v. *First National Bank*, 130 N. J. Eq. 111.

nized that Congress may accord the Executive "a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." *United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304, 320. Cf. *United States* v. *Belmont,* 301 U. S. 324, 330; *United States* v. *Pink,* 315 U. S. 203, 229–230. And the concurrence of both legislative and executive action in the present situation removes all doubt as to the constitutional validity of the regulations involved. Cf. *Hamilton* v. *Dillin,* 21 Wall. 73, 87–88; *Prize Cases,* 2 Black 635, 671; *Hirabayashi* v. *United States,* No. 870, 1942 Term, decided June 21, 1943.

2. Furthermore, even tested by the usual standards applicable to the regulation of domestic affairs, the freeze order herein was valid by reason of subsequent ratifying legislation by which Congress, as the court below held, "removed all question of improper delegation with regard to Order 8389 and provided an adequate standard and guide for his [the Executive's] exercise of discretion in Order No. 8405" (R. 883). By an Act (48 Stat. 1, Section 1, 12 U. S. C. 95b) approved March 9, 1933, Congress provided:

> The actions, regulations, rules, licenses, orders and proclamations heretofore or hereafter taken, promulgated, made, or issued by the President of the United States or the Secretary of the Treasury since March 4, 1933, pursuant to the authority

> conferred by subdivision (b) of section 5 of the Act of October 6, 1917, as amended, are hereby approved and confirmed.

And, more specifically, by Joint Resolution approved May 7, 1940 (54 Stat. 179), Congress provided:

> Executive Order Numbered 8389 of April 10, 1940, and the regulations and general rulings issued thereunder by the Secretary of the Treasury are hereby approved and confirmed.

This Court has recognized that Congress may ratify and confirm executive action taken under color of authority, if it could have taken the action in the first instance and if its power to do so remained unimpaired to the date of ratification. *Swayne & Hoyt, Ltd.,* v. *United States,* 300 U. S. 297, 301–302; *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139, 147; *United States* v. *Heinzen and Co.,* 206 U. S. 370, 382; *Rafferty* v. *Smith, Bell & Co.,* 257 U. S. 226; *Hamilton* v. *Dillin,* 21 Wall. 73; *Prize Cases,* 2 Black 635, 671; *Hirabayashi* v. *United States,* No. 870, 1942 Term. Petitioner does not question (see Pet. 11) the power of Congress to impose such restrictions by statute either at the time Executive Order 8389, the basic freeze order, was issued or at the time it ratified that order. In these circumstances there is no room for doubt that the Congressional ratification gave it adequate legal basis.

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It is equally clear that the Joint Resolution of May 7, 1940, established a sufficiently definite standard for Executive Order 8405, issued three days later, which merely extended the protection of Order 8389 to the Netherlands, Belgium, and Luxembourg and their nationals. In approving the policy considerations inherent in the original order with reference to property in this country belonging to invaded nations and their nationals, Congress obviously sanctioned the extension of its protection to subsequently invaded countries. As the court below observed (R. 883), "A clearer example of that guidance required by the *Panama* [293 U. S. 388] and *Schechter* [295 U. S. 495] cases would be difficult to imagine."

CONCLUSION

The petition should be denied.

Respectfully submitted.

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